

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

50981

FILE: B-181246

DATE: August 18, 1975

97485

MATTER OF: Bamco Machine, Inc.

**DIGEST:**

1. Assignment to bank of Government contract proceeds where bank's alleged financing is through intermediary holding company may not be recognized as statutory assignment since there has been no showing that intermediary or bank actually provided funds to Government contractor or that intermediary expended funds for the performance of the contract.
2. Government contractor's assignment to bank of contract proceeds executed after contractor's operations ceased is invalid under 31 U. S. C. 203 (1970) since purpose of statute removing bar to assignments is to induce financial institutions to lend money to finance contractor's operations.
3. Government contractor's grant of security interest in accounts receivable to holding company alleged to be intermediary for bank's financing of contractor is not valid assignment under 31 U. S. C. 203 (1970), even if properly filed with Government, since Government contract proceeds may be assigned only to financing institutions and holding company does not qualify as proper assignee.

The Accounting and Finance Officer of the Defense Supply Agency has requested an advance decision regarding the propriety of setting off certain funds which are now payable to Bamco Machine, Inc. (Bamco).

On June 24, 1971, contract N00197-71-C-0394 (hereinafter the Navy contract) was awarded to Bamco by the Naval Ordnance Station, Louisville, Kentucky, for 160 air flasks at a unit price of \$140.99. On April 17, 1973, the procuring contracting officer (PCO) issued a partial termination for default for 70 of the 160 flasks and by modification No. P0005, dated June 15, 1973, the unit price of the remaining 90 flasks was reduced to \$134.6175. These 90 flasks were shipped on September 27, 1973, and accepted at the destination on January 22, 1974. Upon examination, it was found that 23 of the 90 flasks were defective and required repairs amounting to \$600, which the PCO requested be withheld. Bamco submitted its invoice in the amount of \$12,115.57 for the 90 flasks with its final shipment.

PUBLISHED DECISION  
53 Comp. Gen. ....

B-181246

Bamco's assets were seized by the Internal Revenue Service (IRS) on November 9, 1973, for nonpayment of taxes which apparently had the effect of closing down Bamco's operations. Also on November 9, 1973, the Seattle First National Bank (Bank) sent a letter to the disbursing officer advising that certain invoices, including the above invoice for \$12,115.57, had been assigned to the Bank by Bamco. However, the assignment was not in the form required by clause 7-103.8 of the Armed Services Procurement Regulation (Assignment of Claims) and the Bank was told to contact the administrative contracting officer (ACO) to properly establish the assignment. The ACO forwarded the appropriate forms and instructions to the Bank on January 17, 1974. The Bank forwarded the proper forms to the ACO on January 30, 1974.

At the time of the action by IRS, Bamco was also performing Air Force contract No. F09603-71-C-1978 (hereinafter the Air Force contract), and had received \$66,121.76 in progress payments. On December 19, 1973, Bamco was default-terminated under this contract and is currently liable for the unliquidated progress payments and also for the reprocurement costs, if and when incurred. When IRS closed down Bamco, the ACO obtained \$77,000 worth of inventory which will be applied to the replacement contract if one is awarded. It is reported that if a replacement contract is not awarded, the inventory will have little value other than as scrap.

The Accounting and Finance Officer has requested answers to the following questions based on the above-stated facts:

1. Does a valid Assignment relationship exist under contract N00197-71-C-0394 between the Seattle First National Bank and Bamco Machine Incorporated?
2. If a valid Assignment exists, does this take priority over the contingent and actual claims of the Government in connection with contract F09603-71-C-1978 existing prior to receipt of notice of this Assignment by the Government, thus permitting payment to the Seattle First National Bank as assignee?
3. If a valid Assignment does not exist, may payment be withheld from Bamco pending finalization of reprocurement cost and progress payment resolution under contract F09603-71-C-1978?

Based upon a review of the record before our Office the following appears to be the manner in which the financing of Bamco was arranged. On November 18, 1970, the Bank took a secured interest

from Bamco in all accounts and contract rights by filing the required financing statement under the Uniform Commercial Code (UCC) with the Secretary of the State of Washington. On December 21, 1970, the Bank took a security interest in all equipment and machinery in the same manner. This was the status of the bank's security arrangement prior to the award of the Navy contract on June 24, 1971. Thereafter, on May 16, 1973, Bamco completed a security agreement with Associated Venture Capital, Inc. (AVC) granting AVC a security interest in all of the types of assets which the Bank had formerly held as security. We have ascertained that AVC is a holding company which owned 48 percent of Bamco's stock. On May 17, 1973, AVC filed a financing statement under the UCC pursuant to the above-mentioned security agreement with Bamco as the debtor, AVC as the secured party and the Bank as the assignee of the secured party, AVC.

Generally, an assignment of accounts receivable from the United States can be lawfully accomplished only through compliance with the Assignment of Claims Act of 1940, as amended, 31 U. S. C. 203, 41 U. S. C. 15 (1970). Under 31 U. S. C. 203 (1970) moneys due under a Government contract may be assigned to a "bank, trust company, or other financing institution." Assignees are required to comply with requirement for written notice of assignments as provided in the Act. In addition, the Act limits the Government's right to reduction or set off as follows:

"\* \* \* payments to be made to the assignee \* \* \* under such contract \* \* \* shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract \* \* \*."

We understand that Bamco's operations were indirectly financed by the Bank through the intermediary AVC. This fact does not invalidate an otherwise valid assignment to the Bank. In Coleman v. United States, 158 Ct. Cl. 490 (1962), the court stated that an assignment to the bank is valid to the extent that moneys were actually paid over to the Government contractor by the intermediary or the bank or to the extent that they were spent by the intermediary to aid the contractor in completing the contract. However, the court held that the burden of proving that the funds advanced by the bank were either used in the performance of the contract or were paid over to the contractor was on the plaintiff, that is on the Bank and the contractor's receiver in bankruptcy. Coleman v. United States, supra, at 497. In the instant

case, the record does not show the extent of the Bank's financing which the intermediary or the Bank paid over to the Government contractor or the amounts used by the intermediary in the performance of the contract. Unless the bank or the contractor, upon request, can make such a showing, the Government may not recognize the assignment as valid, and notwithstanding the no set off provision, may apply the contract proceeds against debts of the contractor otherwise owed to the Government.

More basically, it has been held that the only effect of the 1940 amendment to the Act was to remove the bar to assignments so as to permit contractors to finance their Federal contracts upon the security of assignments of the contract proceeds. Produce Factors Corp. v. United States, 467 F. 2d 1343 (Ct. Cl. 1972); Continental Bank and Trust Company v. United States, 416 F. 2d 1296 (Ct. Cl. 1969) and Alanthus Peripherals, Inc., 54 Comp. Gen. 80 (1974). The Act's purpose, therefore, was to induce financial institutions to lend money to the contractors to finance them in supplying goods to the Government. Central Bank v. United States, 345 U. S. 639 (Sup. Ct. 195).

In the instant case the record does not establish that the Bank obtained an assignment from Bamco prior to such time as the contractor's operations had ceased. Although the instrument of assignment to the Bank and the notice of assignment were dated May 17, 1973, the record indicates that blank forms were furnished the bank by the ACO on January 17, 1974. It appears that the forms provided were completed to reflect the financing statement, dated May 17, 1973, filed by AVC with the State of Washington which names the bank as the assignee of AVC. In addition, the signature of Bamco's president appearing on the instrument of assignment was duly notarized on January 24, 1974. Thus, we must conclude that Bamco's assignment to the Bank was executed only after the contractor's operations had ceased and that the Bank did not finance Bamco's operations upon the security of the contractor's assignment to the Bank. Rather, it appears that the bank relied, if at all, upon Bamco's security agreement with AVC and the designation of the bank as AVC's assignee. However, the security interest granted AVC by Bamco may not be recognized even if properly filed with the Government since, AVC, as a holding company, is not a financing institution and therefore not a proper assignee under the Act. 22 Comp. Gen. 44 (1942).

For the reasons stated, we must conclude that the Government may not recognize the Bank as a valid assignee pursuant to the Assignment of Claims Act of 1940, 31 U. S. C. 703 (1970), as amended.

B-181246

Since we have been advised that the Air Force has incurred procurement costs far in excess of the amount due under the Navy contract, the contract proceeds may be applied against contractor's debts otherwise owed to the Government.

  
Acting Comptroller General  
of the United States